

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F602692

STEVEN R. SMITH, EMPLOYEE	CLAIMANT
KOHLER COMPANY, EMPLOYER	RESPONDENT
CRAWFORD & COMPANY, CARRIER/TPA	RESPONDENT

OPINION FILED JULY 24, 2007

Hearing before Administrative Law Judge O. Milton Fine II on May 22, 2007, in Searcy, White County, Arkansas.

Claimant *pro se*.

Respondents represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 22, 2007, the above-captioned claim was heard in Searcy, Arkansas. A prehearing conference took place on February 26, 2007. A Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. Claimant and Respondents amended the stipulation concerning controversion, resulting in the following four, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The employee/self-insured employer relationship existed at all relevant times, including December 13, 2005.
3. Respondents have accepted Claimant's separate claim for injury to his left arm as compensable, but have controverted the instant claim, for his right arm, in its entirety.
4. The Claimant's average weekly wage is \$1,096.76, entitling him to a temporary total disability rate of \$466.00 and a permanent partial disability rate of \$350.00.
5. Claimant has received indemnity benefits totaling approximately \$10,380.22.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. They were amended to include the dates for which Claimant is seeking temporary total disability benefits, to include an issue concerning statute of limitations, and to reflect that the instant claim concerns only Claimant's right arm. They consist of the following:

Claimant:

1. Whether the Claimant sustained a compensable injury to his right arm.
2. Whether the Claimant is entitled to temporary total disability benefits for his right arm from August 30, 2006 through November 20, 2006.
3. Whether the Claimant is entitled to reasonable and necessary medical treatment for his right arm.

Respondent:

1. Whether this claim is barred by the statute of limitations.
2. Whether the Claimant exceeded his work restrictions.

3. Whether the Claimant's employment was the major cause of his right arm injuries.

Contentions

Claimant at the hearing withdrew his contention regarding controversion, and Respondents amended their contentions to include one regarding an alleged statute of limitations bar. The contentions now read:

Claimant:

1. Claimant contends that he sustained a compensable injury and is entitled to temporary total disability benefits and reasonable and necessary medical treatment.

Respondents:

1. The Respondents contend that the Claimant exceeded his work restrictions and that his employment was not the major cause of his injuries.
2. Respondents contend that Claimant's claim is barred by the statute of limitations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the Claimant/witness and to observe his demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury in the form of right cubital tunnel syndrome.
4. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury in the form of right carpal tunnel syndrome.
5. Claimant's claim regarding his right cubital tunnel syndrome is not barred by the statute of limitations.
6. Claimant's claim concerning his right carpal tunnel syndrome is barred by the statute of limitations.
7. Because of the above findings, the balance of the issues are moot and will not be addressed.

CASE IN CHIEF

Summary of Evidence

_____ Claimant was the sole witness at the hearing.

In addition to the prehearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Respondent's Exhibit 1, a compilation of Claimant's medical records, consisting of one index page and four individually numbered pages; Respondent's Exhibit 2, non-medical records that consist of an Incident Report Form, Form AR-N, and a surveillance report, consisting of one index page and 13 individually numbered pages; and Respondent's Exhibit 3, a DVD containing surveillance footage of Claimant. Also, a letter from Claimant dated August 29, 2006 and filed with the Commission on August 30, 2006, wherein he requested a hearing on this claim, has been blue-backed to the record.

Testimony

Because of Claimant's *pro se* status, and without objection from Respondents, I initiated the questioning of him, and then afforded Respondents the opportunity to cross-examine him. His testimony was as follows on direct examination:

Claimant testified that his full name is Steven Ray Smith. He is 38 years old and a resident of Bradford, Arkansas. On December 13, 2005 he was working at Respondent Kohler, taking apart a machine used to polish sink parts. He was on top of the machine, using a eight to ten-inch length socket wrench with a 9/16-inch socket at shoulder height to loosen some bolts. As he was yanking on the wrench around 7:25 to 7:28 p.m., he felt a "pop" in his right elbow. He stated that he stopped work and reported the injury to his foreman, Paul Walker, who was standing there with him at the time. Claimant also testified that he had previously told the foreman that he was having pain in his elbows, and that the foreman had "noted them down."

At approximately 7:30 p.m. that night, he went to see Dr. Wornock, and was given Hydrocodone. No x-rays or other diagnostic tests were performed. Claimant first stated that he was sent back to work on light duty, and later in his testimony said he returned to full duty the same night. He returned to Dr. Wornock on December 21, 2005, and was referred to Dr. Moore, who referred him to Dr. Rutherford for a nerve conduction study. Claimant testified that the study found that he had right carpal tunnel syndrome and "nerve damage" in his right elbow.

On August 30, 2006, Claimant underwent a right cubital release and attachment and a right carpal tunnel release. He stated that he was released from care on November 20, 2006.

On cross-examination, Claimant admitted that he never filed a report concerning the December 13, 2005 incident. He filled out a report on March 2, 2006, but that pertained to an injury on December 22, 2005. He also stated that he had a problem with his right carpal tunnel syndrome in 2002 that entailed his using a brace. He saw Dr. Wornock and was supposed to have seen Dr. Moore about it then, but got sidetracked due to back surgery. However, he switched jobs, from being a trim press operator to a polisher, and his condition improved. At the time he saw Dr. Wornock in December 2005, he indicated that he had been having problems with his right arm for several months.

With regarding to the surveillance video that is Respondents' Exhibit 3, Claimant testified that he was seen pushing a 1994 Ford Ranger pickup and climbing in and out of and changing the spark plugs on a Ford F250 truck. Claimant denied that he has helped his brother in his businesses or that he had any side jobs while at Respondent Kohler. Since the truck at Kohler began on December 8, 2006, Claimant has helped a friend put stucco on a building in Batesville. Claimant denied that he hunted in 2006, but stated that he still fishes. He testified that while he writes with his left hand, he is right-handed and that his right arm is stronger than the left.

On redirect examination, Claimant stated that he was not arguing that the December 2005 incident caused his right arm problems, but "that's when the first initial problem that I was having. It may have been ongoing because—it may have popped out all at once and, then again, it may have been a slow thing and—and I just never noticed it." He testified that in December 2005 he worked as a mechanic at Respondent Kohler and not on an assembly line, and that his job depended on what needed to be done:

I may go in there and not touch a wrench all day. I may go in there and just have do some computer typing on it. But then, there's some days I may go in there and never sit [*sic*] a wrench down for eight hours.

Due to Claimant's *pro se* status, he was given an opportunity to make a statement at the end of his testimony. He said the following:

On the video, I've watched the video that Ms. Worley had sent me, and, yes, I did push on that Ranger. That's evident, and I did work on my truck. But, as I watched the video—and I'm a right-handed person and, normally, when you change plugs in a truck, it takes you an hour. And they video taped me—I believe it was up to, what, 10:30 that day and I actually got done with that truck at about 1:30, because I used my left hand and I normally would have done it right-handed, normally on that case. But, anything I did was not to deceive anybody or—you know, I didn't—I didn't do like I normally do. I'm a very active person and I like to hunt and fish and everything consisting of using my right hand. But I didn't do nothing [*sic*] to deceive Workman's [*sic*] Comp or anything.

Respondents called no witnesses.

Records

Respondents' Exhibit 1. The medical records of Claimant that were introduced at the May 22, 2007 hearing and are part of Respondents' Exhibit 1 reflect that on June 29, 2006, Dr. Michael Moore wrote a letter to Ms. Kathy Contorno of Respondent Crawford that reads in pertinent part (omitting references to his left carpal tunnel syndrome, which Respondents have accepted as compensable and which is not at issue here):

Mr. Smith also describes intermittent pain and numbness in his right arm. A nerve conduction and EMG study performed on 03/21/06 was consistent with right carpal tunnel syndrome and right cubital tunnel syndrome.

The review of systems referable to the musculoskeletal system is otherwise unremarkable and unchanged from the previous evaluation on 06/01/06.

.....

I discussed treatment options with Mr. Smith. He reported that he would like to proceed with right carpal tunnel release and right cubital tunnel release

with intramuscular transposition of the ulnar nerve, which I felt was a reasonable decision. I reviewed the indications, risks, and potential complications of surgical treatment and all questions were answered. The surgery will be performed on an outpatient basis in the near future.

....

Finally, Mr. Smith describes multiple areas of pain in both hands and elbows

....

If Mr. Smith should experience persistent pain symptoms in both hands and arms following the right arm surgery, it will be my recommendation that Mr. Rick Byrd perform a Functional Capacity Evaluation. Based on the results of this evaluation, I will determine whether Mr. Smith requires any further evaluation or treatment. I anticipate the will reach his maximum medical improvement approximately 12 weeks following the right carpal tunnel release and right cubital tunnel release with intramuscular transposition of the ulnar nerve. These statements are made within a reasonable degree of medical certainty.

On November 21, 2006, Dr. Moore again wrote Ms. Contorno the following (which again omits references to Claimant's left carpal tunnel syndrome):

Mr. Smith was seen at the Arkansas Hand Center on 11/21/06 approximately 3 months following a right carpal tunnel release and right cubital tunnel release with intramuscular transposition of the ulnar nerve. He reports the pain and numbness in his right hand and arm have significantly improved. He has regained full strength in the right upper extremity.

....

Mr. Smith has reached his maximum medical improvement. His physical examination and objective studies do not suggest an impairment of the right hand or arm. These statements are made with a reasonable degree of medical certainty. He can resume regular activities, including work. He will return to the office if he has any problems in the future.

Respondents' Exhibit 2. An Incident Report Form for Respondent Kohler dated March 2, 2006 reflects that on that date Claimant reported that on December 22, 2005 he suffered a sprain of his left elbow and shoulder while maintaining and repairing polishing equipment. Paul Walker signed the form as foreman.

Also part of this exhibit is a Form AR-N for Claimant that is dated March 2, 2006 that states that he injured his left elbow and shoulder on December 22, 2005 due to “over exertion [*sic*] with tools.”

Included in this exhibit is a surveillance report on Claimant by Crawford Investigation Services, Inc. dated August 31, 2006. The report recounts that Claimant was observed on six non-consecutive days as he pushed a vehicle, using both arms; working on the engine of a vehicle; removing a car radio from the dashboard of a vehicle; and entering, exiting and driving a vehicle.

Respondents' Exhibit 3. This exhibit is a CD/DVD containing, *inter alia*, surveillance footage of Claimant as described in the report above.

ADJUDICATION

A. Compensability

Claimant has contended that he suffered compensable injuries in the form of right cubital tunnel syndrome and right carpal tunnel syndrome while performing job duties for Respondent Kohler. He appears to be arguing that the injuries were due either to a specific incident or were due to repetitive job duties.

In order to prove the occurrence of an injury caused by a specific incident or incidents identifiable by time and place of occurrence, a claimant must show by a preponderance of the evidence that: (1) an injury occurred that arose out of and in the course of his employment; (2) the injury caused internal or external harm to the body that required medical services or resulted in disability or death; (3) the injury is established by medical evidence supported by objective findings, which are those findings which cannot come under the voluntary control of the patient; and (4) the injury was caused by a specific

incident and is identifiable by time and place of occurrence. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the alternative, in order to establish the occurrence of a gradual onset or cumulative trauma injury, the claimant must prove by a preponderance of the evidence that: (1) he sustained an injury arising out of and in the course of employment; (2) the injury caused external or internal physical harm to the body; (3) the injury is supported by objective medical findings; (4) the injury was caused by rapid repetitive motion; and (5) the injury was the major cause of any disability or need for treatment. *Stevenson v. Frolic Footwear*, 70 Ark. App. 383, 20 S.W.3d 413 (2000).

Right Cubital Tunnel Syndrome. Claimant testified that on December 13, 2005 he felt a “pop” in his right elbow around 7:25 to 7:28 p.m. while working at Respondent Kohler, using a socket wrench to take apart a machine used at the factory. He stated that he stopped work and reported the injury to his foreman, Paul Walker, who was standing there with him at the time. He also testified that he had previously told the foreman that he was having pain in his elbows, and that the foreman had “noted them down,” but he did not give a time or date when he first experienced the elbow pain. He testified that he went to see Dr. Wornock that day, and that he was ultimately referred to Dr. Moore. As shown in Respondents’ Exhibit 1, Dr. Moore found that a nerve conduction and an EMG study performed on March 21, 2006 “was consistent with . . . right cubital tunnel syndrome.”

For this condition, Claimant appears to be arguing that this condition was either caused by a specific incident on December 13, 2005 or was a gradual onset injury. With regard to his contention that the right cubital tunnel syndrome was caused by the specific incident of using the socket wrench on December 13, 2005 to loosen bolts, Claimant

admits that he never filed an incident report on this alleged incident. As his testimony and Respondents' Exhibit 2 reflect, in March 2002 he gave a date of injury of December 22, 2005. His medical records are silent on the incident as well. His right cubital tunnel diagnosis did not occur until over three months after this alleged incident. It is true that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on the evidence that the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962). But it also true that the determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

Based upon my observation of the witness, I do not find that he suffered cubital tunnel syndrome as a result of the December 13, 2005 (or even December 22, 2005) incident based on his bare, unsupported testimony. The surveillance video shows that Claimant performed mechanical repairs using a socket wrench when he was not on the job at Respondent Kohler (Claimant admitted in his testimony that he was changing spark plugs in the video)—and this was after his right cubital tunnel diagnosis and surgery, but before his release. Such an activity, pre-diagnosis, could just as easily have been the

cause of his condition. Speculation and conjecture cannot serve as a substitute for proof. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979).

Claimant's alternate contention is that his cubital tunnel syndrome is a gradual onset injury. Again, he must show, *inter alia*, that his duties involved rapid repetitive motion. See Ark. Code Ann. § 11-9-102(4)(A)(ii)(a). He cannot meet this burden. In *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W.2d 644 (1998), the Arkansas Supreme Court held that there is a two-part test for determining whether an injury is caused by rapid repetitive motion: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. If the first element is not met, the second is not reached. *Id.*; *Westside High School v. Patterson*, 79 Ark. App. 281, 86 S.W.3d 412 (2002). Moreover, "even repetitive tasks and rapid work, standing alone, do not satisfy the definition. The repetitive tasks must be completed rapidly." *Malone, supra*.

In describing his job at Respondent Kohler, Claimant testified:

I may go in there and not touch a wrench all day. I may go in there and just have do some computer typing on it. But then, there's some days I may go in there and never sit [*sic*] a wrench down for eight hours.

He did not show that his tasks were either repetitive or rapid.

Respondents have argued that Claimant cannot establish entitlement to relief because his employment was not the major cause of his injuries. However, § 11-9-102(4)(E)(ii) instead provides that Claimant show that "the alleged compensable injury is the major cause of the disability or need for treatment." See *Medlin v. Wal-Mart Stores, Inc.*, 64 Ark. App. 17, 977 S.W.2d 239 (1998). Dr. Moore's two reports in evidence enable Claimant to establish this element. However, due to the other failures recited above, the injury is not compensable.

Right Carpal Tunnel Syndrome. Under Ark. Code Ann. § 11-9-102(4)(A)(ii)(a),

“compensable injury” means:

(ii) An injury causing internal or external physical harm to the body and arising out of an in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition[.]

The medical evidence, supported by objective findings, shows that Claimant was diagnosed by Dr. Moore, following an EMG and a nerve conduction study, as having right carpal tunnel syndrome. It is unnecessary to prove rapid repetitive motion when there is a diagnosis of carpal tunnel syndrome. *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998).

I find that the Claimant has proven that his right carpal tunnel syndrome of the right wrist was an injury causing physical harm to the body, and he has established this by medical evidence supported by objective findings. That, however, leaves the question of, *inter alia*, whether his injury arose out of and in the course of his employment by Respondent Kohler. His problem with establishing the causal connection between this injury and his employment is the same as for his cubital tunnel syndrome. There is no medical opinion on this, and in light of Claimant’s documented outside mechanical work, I would be speculating in ruling that his job caused this injury. Consequently, under both the specific-incident and gradual-onset contentions, I find that Claimant has failed to establish his carpal tunnel syndrome to be a compensable injury by a preponderance of the evidence.

B. Statute of Limitations

Arkansas Code Annotated Section 11-9-702(a)(1) states in pertinent part:

A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury.

Claimant's cubital and carpal tunnel syndrome are scheduled injuries. See Ark. Code Ann. § 11-9-521(a)(1)-(2). This statute of limitations applies to scheduled injuries. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). The court in *Baker* held that a work-related and noise-induced hearing-loss claim does not become a compensable one until "(1) the injury develops or becomes apparent and (2) the claimant suffers a loss in earnings on account of the injury, *which loss is conclusively presumed.*" *Id.* (emphasis in original) As the statute does not begin to run until both elements are met, and due to the conclusive presumption regarding loss of earnings, "the statute of limitation on a hearing loss claim starts to run when the hearing loss becomes apparent to the claimant." *Id.* In *Pina v. Wal-Mart Stores, Inc.*, 91 Ark. App. 77, 208 S.W.3d 236 (2005), the Arkansas Court of Appeals held that the reasoning in *Baker* extends to any other scheduled injury—meaning that the statute starts to run when the injury "becomes apparent to the claimant."

Claimant filed this claim on August 30, 2006, when the Commission received his letter requesting a hearing. I have blue-backed this document to the record. No Form AR-C was ever filed. Claimant testified that he experienced a "pop" in his elbow on December 13, 2005. He also stated that he had previously told the foreman that he was having pain in his elbows, and that the foreman had made note of it; but he did not give a date when

he first experienced the elbow pain. There is no evidence in the record of Claimant's right cubital tunnel syndrome becoming apparent any earlier than December 2005. Hence, his claim regarding this injury was filed within the statute of limitations.

As for his right carpal tunnel, Claimant admitted on the stand that he had this condition in 2002, and that he was using a brace then because of it. Because this injury became apparent at least three years prior to the filing of this claim, the statute of limitations bars recovery for this injury.

C. Balance of Issues Under This Claim

Because of the above findings, the balance of the issues under this claim are moot and will not be addressed.

CONCLUSION

Claimant has failed to prove by a preponderance of the evidence that his right cubital tunnel and right carpal tunnel injuries are compensable. Moreover, Claimant's carpal tunnel claim is clearly barred by the statute of limitations. Therefore, his claim must be, and hereby is, denied and dismissed.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge